

## **ENVIRONMENTAL QUALITY COUNCIL**

February 22, 1996, Montana State Capitol

Original Minutes with Attachments

### **COUNCIL MEMBERS PRESENT**

Mr. Jerry Noble, Chair  
Rep. Vicki Cocchiarella,  
Vice-Chair  
Sen. Steve Doherty  
Sen. Lorents Grosfield  
Mr. Glenn Marx  
Sen. Ken Mesaros  
Rep. Scott Orr

Rep. Bill Ryan  
Rep. Debbie Shea  
Mr. Jerry Sorensen  
Ms. Jeanne-Marie Souvigney  
Rep. Bill Tash  
Mr. Greg Tollefson

### **COUNCIL MEMBERS EXCUSED**

Sen. Vivian Brooke  
Sen. William Crismore  
Rep. Dick Knox  
Sen. Jeff Weldon

### **STAFF MEMBERS PRESENT**

Mr. Todd Everts  
Mr. Michael Kakuk  
Ms. Sallie Melcher  
Mr. Larry Mitchell  
Ms. Kathleen Williams

### **VISITORS' LIST**

Attachment 1

### **COUNCIL ACTION**

Voted to approve the minutes of the December 21 & 22 EQC meeting.

Voted to form an Environmental Indicators subcommittee.  
Subcommittee members include co-chairs, MR. TOLLEFSON and MR. SORENSEN, REP. TASH, MS. SOUVIGNEY and MR. MARX.

Voted to approve staff applying for a Florida State University grant to help finance publishing the findings of the current environmental indicators study.

Voted to direct staff to proceed with producing a booklet that will explain Montana's water laws for a non-technical audience.

### **CALL TO ORDER AND ROLL CALL**

The chair called the meeting to order at 8:30 and asked the secretary to take note of the roll. (Attachment 1)

### **APPROVAL OF MINUTES**

The Council voted unanimously to approve the minutes of the December 22, 1995 meeting.

### **ADMINISTRATIVE MATTERS**

#### **Legislative Branch Pay Plan and Classification Update**

BOB PERSON, Director of the Legislative Services Division, reported that the study of the legislative branch pay plan and classification system had fallen behind schedule and probably wouldn't be complete until the end of March. The report will then be presented to the Legislative Council. He also reported that MR. EVERTS had not yet been confirmed as Legislative Environmental Analyst by the Legislative Council.

REP. COCCHIARELLA expressed frustration concerning the length of time it was taking to change MR. EVERTS' status from "acting" to "permanent." She said she had attended the last meeting of the Legislative Council and, although she had requested before the meeting that the matter of MR. EVERTS' status be discussed, it was not on the agenda. She asked MR. PERSON if it could be on the next meeting's agenda. MR. PERSON said he had discussed the matter with the Legislative Council chair, SEN. LYNCH. MR. PERSON said he saw no reason it could not be included in the next meeting's agenda. He said the hold-up might be, in part, that there are questions on the part of the Legislative Council regarding the process followed in the hiring of MR. EVERTS. Although, MR. PERSON added that he thought, as a member of the hiring committee, the selection process was good. MR. NOBLE said that if there was a problem or a question regarding the hiring of MR. EVERTS as LEA, the EQC would like to know as soon as possible, to get the issue resolved.

SEN. GROSFIELD asked MR. PERSON if there was any action the EQC could take to expedite the process. MR. PERSON said the EQC could, at their own discretion, express formally their concerns to the Legislative Council.

MR. NOBLE said that when he attended the meeting of the Legislative Council at which he announced the hiring committee's selection of MR. EVERTS and asked for the Legislative Council's approval, he sensed SPEAKER MERCER had unexpressed questions regarding the hiring process. MR. NOBLE asked MR. PERSON to discuss this with SPEAKER MERCER to find out exactly what his concerns were. MR. PERSON said the hiring committee had no reason at any point in the hiring process to think the process would be questioned.

REP. COCCHIARELLA expressed her views on the pay and classification study. She said she thought the Legislative Council would have a difficult time adopting a pay and classification system because the study revealed that there are disparities in the pay system, and there may not be enough money to correct the disparities. REP. COCCHIARELLA feels this may cause problems.

#### **Honzel Decision Update**

MR. EVERTS announced that Judge Honzel had issued a judgement awarding attorney's fees in the amount of \$5,737.50, to the petitioners in the case of the right-to-know lawsuit against the Legislative Council by the Montana Environmental Information Center (MEIC). The fees will be paid from diversion funds of the Legislative Services Division.

MR. NOBLE asked MR. PERSON about the progress of the subcommittee that has been charged with devising a process to implement Judge Honzel's decision (that the public must have access to all phases of a bill in the drafting process.) MR. PERSON said the subcommittee had not yet met.

#### **MONTANA ENVIRONMENTAL POLICY ACT SUBCOMMITTEE UPDATE**

SEN. MESAROS reported on the subcommittee meeting of February 21, 1996. He said the main agenda item had been the set of guideline amendments submitted by JOHN NORTH, staff attorney for the Department of Environmental Quality (DEQ). SB 231 had an effective date of October 1, 1995, so the DEQ had already submitted rules before that date. The subcommittee identified several points in those rules that they wanted to have clarified. The amendments submitted at the February 21 meeting were in response to that request. SEN. MESAROS said the subcommittee was taking the proposed amendments under consideration and at future meetings the rules and amendments would be distributed for public comment.

Other matters discussed were the progress of various agencies in implementing SB 231, a MEPA case law update on the Ravalli County Fish and Game Association v. the Department of State Lands, an explanation of MEPA's role in various governmental actions, a report on the progress of the MEPA handbook rewrite and MEPA training, as well as a discussion of criteria for the George Darrow MEPA award.

MS. SOUVIGNEY asked when the full EQC would be able to review the amendments to the MEPA guidelines. SEN. MESAROS said they could review the guidelines immediately, if they wanted.

MR. NOBLE asked MR. EVERTS to distribute the amendments to EQC members who would like them.

#### **ENFORCEMENT AND COMPLIANCE SUBCOMMITTEE UPDATE**

REP. COCCHIARELLA reported the subcommittee had been working diligently to get through a demanding agenda. There were meetings on January 25, February 21 and there would be another on March 20 and 21. She distributed lists of future meeting dates and of enforcement compliance programs reviewed so far. She said the subcommittee wanted the EQC and the public to be made aware of the process they were going through to fulfill the mandate of HJR 10, so anyone who had input would be able to contribute. She

explained the process the subcommittee was using. First they listen to an overview of each program. Then, they listen to and read comments from the regulated community and from the public regarding each program. To facilitate commenting, the subcommittee devised a form to be filled out targeting specifics of the programs. Through this process the subcommittee hopes to identify the leading issues in enforcement and compliance programs in the state.

MR. NOBLE asked if the subcommittee would be able to "hammer out a bill" for the legislature to consider in the next session.

REP. COCCHIARELLA said she thought they would be able to complete their task by the end of the interim.

MR. NOBLE noted that there was some controversy at the previous day's C&E subcommittee meeting. He asked if there was any feeling among EQC members that it could have been avoided if they had formal rules regarding public comment at meetings.

REP. COCCHIARELLA, co-chair of the Enforcement and Compliance subcommittee, said she could see, in retrospect, how the process might have benefited from a discussion about protocol at the beginning of the meeting. She said the city council in Missoula worked to develop a protocol to assure everyone who wanted to get a chance to speak at meetings. She said the incidents of the previous day should not be emphasized too much, so as not to fuel the fire.

SEN. MESAROS asked for clarification about what happened for the benefit of those who were not at the Enforcement and Compliance subcommittee meeting.

REP. COCCHIARELLA explained that the Enforcement and Compliance subcommittee agenda had included a discussion of the state's pesticide regulations, enforcement and compliance. She said there were members of the public there who are very interested in this issue who spoke at length about pesticides. Because the meeting was three hours behind schedule

REP. COCCHIARELLA asked that the comments be limited to three to five minutes. This request elicited remarks that the process was

oriented toward industry. There were remarks made questioning the abilities of state employees. REP. COCCHIARELLA said DON ALLEN, Montana Wood Products Association, spoke in defense of the state employees and then "it got hot."

MR. TOLLEFSON said he felt there was a danger in blowing the incidents out of proportion. He said he believes that sometimes people may get off track with their comments, but that is just a glitch in a process he thinks works well.

MR. SORENSEN said he thought it was an insult to everyone else at the meeting who had to listen at such length to what was, he felt, irrelevant testimony.

SEN. GROSFIELD said he agreed. He said he thought the individuals under discussion were insulting to the subcommittee. He said he was very concerned about keeping the process open to the public, but that if people commenting have no credibility they waste people's time. SEN. GROSFIELD said it was his perception that by the end of the meeting no one was even listening to the individuals in question. He felt that many of their comments were insulting and uncalled for.

MR. TOLLEFSON reiterated that the Council should not put too much emphasis on the subcommittee meeting's conflict. He said he doesn't think it's possible to limit what certain individuals say, without limiting everyone's constitutional rights.

SEN. DOHERTY said maybe a "quicker gavel" could have solved the problem. But, he said, the EQC should keep in mind its function as a "pressure valve," and as a forum where people may have their say even if they are not effective speakers. In his opinion, they will not achieve their perceived goals, anyway.

MR. NOBLE said he felt that perhaps when someone had the floor and they began to get off the point or to get insulting, the Chair should "step in" with a reprimand. He asked if MR. ALLEN would like to add any comments.

DON ALLEN said he felt everything had been covered in the Council's discussion. He said he agreed the best way to handle situations such as the previous day's were to have the chair

intercede more quickly when testimony got off the subject or became insulting.

REP. COCCHIARELLA resumed her summary of the Enforcement and Compliance subcommittee meeting. She encouraged the Council and the public to let interested persons know when future subcommittee meetings are scheduled and to let them know what would be on the agenda, because the subcommittee needs input as soon as possible. She also asked subcommittee members to write down issues they gleaned from the previous day's meeting and turn them over to staff.

#### **SENATE BILL 382 STUDY UPDATE**

MR. MITCHELL explained that SB 382 initiated a study of the state's joint and several liability requirements and the Comprehensive Environmental Clean-Up and Responsibility Act (CECRA). He said the study group had met twice. At the first meeting participants discussed the meaning and the implications of strict joint and several liability. At the second meeting the various caucuses (the State, the interest groups, the potentially responsible parties, and the local governments) delineated the weaknesses and strengths of joint and several liability. In many cases, MR. MITCHELL said, the weaknesses named by one caucus were considered strengths by another. For example, he said, the potentially responsible party (PRP) caucus thought that joint and several liability had a chilling effect on the transfer of real estate. Conversely, one of the strengths of joint and several liability determined by other caucuses was that before land is sold, it must be cleaned up. MR. MITCHELL said the meeting also included a presentation on other states' joint and several schemes. MR. MITCHELL said that two subcommittees had been formed. One of the subcommittees has been charged with determining average costs of different types of cleanups. After they complete their work, another subcommittee will put together those costs in Montana with liability schemes in other states to

compare costs under different scenarios. There will be no more meetings of the whole study group. The Consensus Council will be shuttling among caucuses to put together "working papers" of consensus items. There may be another meeting in May to see if there is any consensus on an alternative liability scheme.

SEN. DOHERTY, referring to MR. MITCHELL's comments about liability in land transfers, asked about a bill passed last session that was "written by the lending industry" regarding removing liability for banks and insurance companies in land transactions. MR. MITCHELL said he wasn't familiar with the legislation but that he was familiar with the issue. He said that banks and insurance companies are well-represented in the study group, but he had not heard anything about a bill that addressed those concerns. He said, however, he knew of a change in CECRA that removes responsibility from entities having only a mortgage interest in a site.

MR. NOBLE asked if GERALD MUELLER, facilitator of the study group, had any comments about the SB 382 study group. MR. MUELLER said criteria to evaluate alternative liability schemes was the ultimate goal of the group. He said he was encouraged at how the group was working together.

MR. MITCHELL reviewed other aspects of SB 382. He noted that it also establishes a mixed funding pilot program to provide for the reimbursement of clean-up efforts from the metalliferous mines tax for the first three parties to apply under the statute up to \$300,000 per site. The other portion of the bill sets up a voluntary clean-up plan to formalize a program whereby groups can get certification from DEQ after a clean-up.

JOHN GEACH, Administrator of the DEQ Environmental Remediation Division supplied some background on SB 200--the bill to which SEN. DOHERTY was referring. It was sponsored by the Banking Association and, as he recalled, there was no opposition to it. It provides limited liability for the lender when acting in a



fiduciary capacity. It does not wipe out liability for the site. The owner/operator is still liable.

MR. GEACH went on to discuss SB 382, specifically the pilot program, a voluntary clean-up program. He said the DEQ had a list of about 275 sites that are on the CECRA list. Many of the site owners had spoken with the DEQ about doing voluntary clean-ups. The DEQ has always encouraged voluntary clean-ups. He said by including the voluntary clean-up portion in SB 382, they now have a set process for people to follow so that the state has official criteria for approval. To be eligible for the voluntary clean-up program, the site must be one on which the state has taken no previous enforcement action. In addition, clean-up of a site must not be extremely complex, or it is also not eligible. So far, there are 16 parties that have indicated they are interested in the program. The program was heavily publicized through personal letters and press releases. There was good response, but most of the people who expressed interest in the program did not realize they had to pay for the clean-up up front and then get reimbursed. Most said they did not have the money to do that. Many of those people were referred to the Abandoned Mines Program.

SEN. GROSFIELD said he understood the Abandoned Mines Reclamation program applies to properties that date back before 1973. He wondered why the sites they were referring to the Abandoned Mines program didn't already know about the Abandoned Mines program.

MR. GEACH said they made a concerted effort to contact as many people who might be interested in the SB 382 voluntary program as they could, which may have resulted in them turning up some names of people who had never been contacted before. Those that seemed to be eligible for the Abandoned Mines program, were referred.

SEN. GROSFIELD asked if they had heard from the Abandoned Mines program whether they were being contacted by the referrals. He said that was something that DEQ staff should be following up on.

MR. NOBLE asked MR. GEACH if he thought SB 382 was adequate; or if it was a flaw in the bill that property owners had to pay for

the clean-up and than get reimbursed. He was wondering if maybe a change was necessary to make the bill more effective in getting done what it set out to do. MR. GEACH said the amendment to SB 382 that included the voluntary clean-up came into the conference committee on the next to last day of the 1995 session. He said the DEQ didn't participate in the drafting of the language. He agreed with MR. NOBLE that there might be a better way to facilitate the voluntary clean-ups.

MR. GEACH said they had received two applications submitted under the mixed funding portion of SB 382. One was for the Joslyn Street tailings site submitted by Burlington Northern (BN), one of three parties responsible for the site. There was an application from Corbin Flats to join the program submitted by Montana Tunnels.

SEN. DOHERTY asked, regarding the BN fuel contamination sites, if they were falling under the voluntary clean-up program or if they were looking for money to clean up those sites. MR. GEACH said they would not be eligible for clean-up, only abandoned mines. It has to be on the top ten sites list. He said they had been working with BN for several years on those sites. They have been working on a voluntary basis. They have now formally entered the SB 382 voluntary clean-up program.

SEN. DOHERTY asked if the voluntary sites had been in use in recent times and if there was any consideration of how much money had been generated by site owners over the years from using the sites. MR. GEACH said in apportioning liability the DEA has to consider what portion of the contamination was contributed by the responsible party and that party will be only eligible for the portion they clean up that is above and beyond what they are responsible for. He said the amount of money generated by the owner of a site by its use is not a factor the statute directs the DEQ to consider.

MR. MITCHELL said he had received an update from Carol Fox, manager of the CECRA program for the state. He said the memo answered a question from Senator Grosfield. The mixed funding

pilot program said that three applications have to come from the top ten sites designated by the State as most in need of clean-up. That's where the Corbin Flats and Joslyn Street sites come from. She said they received about 25 calls in July and August of 1995, but when the callers discovered they would be required to supply money "up front," most said they could not even afford to hire the consultants required by the program to devise a plan. They referred many calls to the DEQ Mine Reclamation Program, which is currently addressing seven of the 10 sites.

DICK JUNTENAN, mining reclamation consultant and former bureau chief of the Abandoned Mine Reclamation Bureau, said he felt the voluntary clean-up program was "missing the boat" regarding potential voluntary reclamation that can occur on a lot of the mine sites. He said he represents clients who are interested in cleaning up sites. He mentioned Crow Creek Falls as an example of a site the industry was interested in cleaning up as a "good will gesture." But, he said, parties were backing away because of fear of liability. He said one option would be for the mining industry to give money to the DEQ and they could go in and clean it up, but that plan was not popular with the industry. The other option would be to get a reclamation plan approved under the SB 382 program, but he said, the problem with that program is, as MR. MITCHELL read from the letter from the DEQ, most of the sites on the list are small sites and they can't afford a consultant to test and prepare plans. Pre clean-up work on a small site could cost \$25,000 to \$50,000 for a site that would only take \$15,000 to \$20,000 to clean up. He said there are many small sites that the program can't and doesn't help. He thinks there should be legislation in the next session to deal with this problem.

REP. COCCHIARELLA asked MR. JUNTENAN if he had any specific ideas about how to resolve the problem. MR. JUNTENAN said he had worked with the DEQ on the Crow Creek Falls site and they suggested the possibility of implementing a system of abbreviated plans in the form of letters addressing specifics of clean-up

briefly. He doesn't know if this would be legal, but if the DEQ could streamline the process this way for the small sites, it would help. The DEQ could visit the site and write a clean-up plan and give approval. He thinks this would be the best way. He said this plan would necessitate finding a way to designate "small" sites.

SEN. DOHERTY asked why the industry does not want to donate money to the DEQ to do the clean-ups. MR. JUNTENAN said he thought it might be because in past cooperative projects with the state, where the state handled the money, the clean-ups ended up costing more than the industry thought they should and industry felt they weren't getting their money's worth.

SEN. DOHERTY said he recalled that the Abandoned Mine Reclamation Program is funded entirely from funds from mines. He wondered what the industry would think of taking the same amount of money the coal mines paid to the hard rock industry and putting that in funding voluntary clean-ups while tightening down on the DEQ so they don't "waste money." MR. JUNTENAN said there is such a fund, but it's being used to fund the DEQ budget, not for reclamation.

SEN. DOHERTY asked if the money the coal industry pays into reclaiming abandoned mines the same amount as the hard rock industry is paying into that program which funds the DEQ. MR. JUNTENAN said he didn't know. He said coal appropriations if fully funded is around 7 or 8 million dollars a year.

MR. MARX asked MR. JUNTENAN if Vossberg was considered a small site. MR. JUNTENAN said no, that Vossberg was probably a large site that would require the full reclamation planning process.

MR. MARX asked if MR. JUNTENAN thought it would be possible to sit down and define the terms "small site" and "large site." MR. JUNTENAN said he felt it was possible.

ANN HEDGES, representing the Montana Environmental Information Center and as a participant in the SB 382 study, said one of the avenues being investigated by the SB 382 study group is to find a

way to release sites from liability, some sort of official letter from the DEQ, because they recognize that as a problem.

SEN. GROSFIELD asked, regarding the fund that MR. JUNTENAN said was being used for the DEQ's operating budget instead of reclamation, if that money was being directed toward the purpose it was intended. MR. MUELLER said that JOHN TUBBS, DNRC Research and Development Bureau, is a study group member. He said the orphan shares are an issue under discussion. Orphan shares are sites with no responsible parties. The group hasn't gotten to a point of deciding how to deal with it.

#### **EQC INDICATORS PROJECT**

MR. MITCHELL reviewed the progress of the project and told the EQC the staff would like two decisions from the Council. The first was whether to apply for a grant available for indicators projects. The other decision staff was requesting was in what manner the Council would like to be involved in the project. MR. MITCHELL referred to the EQC 1975 Indicators report, an update of a 1972 report, comprising existing data and organized in two parts--statewide indicators and indicators in various geographical regions of the state. There were 26 indicators and an explanation of why those indicators were selected, (mainly because there was available data). The staff developed the report and it was reviewed by the Council, an academic review group and a state advisory review committee from the executive agencies. The purpose was driven by the same statutory language that is driving the current report, to gather and assemble information to help make decisions about environmental issues. He said there is abundant new information on indicators. MR. MITCHELL said, as far as the funding was concerned, that a grant was available from Florida State University. The grant fund would cover eight projects at \$10,000 a piece to produce indicators reports. MR. MITCHELL shared with the Council a series of indicators reports from throughout the country. He said the application was due quite soon so he needed a decision from the

Council immediately. He said staff also wants to know how involved in the project the Council wants to be.

MR. EVERTS said that without the grant mentioned by MR. MITCHELL, they would have about \$2700 available to produce an indicators report. Regarding staff resources, MR. EVERTS said they had .25 of an FTE from Legislative Council staff to help out and they have met with representatives from the University of Montana and Montana State University and both have offered interns and facilities. He said there might be some additional LSD money but he wasn't sure.

MR. SORENSEN said that when he moved to pursue an indicators report at the last meeting of the EQC , he envisioned it as an experimental model to see how the indicators might help determine trends in environmental quality and as a means to fulfill the statutory requirements. He said it would be helpful to pursue the grant and the human resources to do the report, which he envisions as a simple product similar to Vermont's. He said it might be made more extensive in the future or eliminated depending on how well it works. MR. SORENSEN said he also recommended the Chair appoint a subcommittee to flesh out the indicators that would be included. MR. TOLLEFSON said he agreed with MR. SORENSEN and that he thought whether the Council receives the grant will dictate the final form of the publication. He agreed with the need for a subcommittee.

MR. NOBLE asked if MR. EVERTS thought they had time to get an indicators report published by the end of the year. MR. EVERTS said it would depend on the scope of the project as determined by the EQC. He said with a shorter, less complex report with general statewide indicators, he thought it could be completed by year-end.

MR. TOLLEFSON said they should wait to try to figure out when the project will be complete until they have nailed down data availability, funding availability, etc.

SEN. MESAROS asked when they would be notified about whether they got the grant. MR. MITCHELL said he was told the applicants would be contacted by March 15.

SEN. MESAROS noted that whether the EQC received the grant funds or not would definitely affect the final product, and he advised the subcommittee to consider that.

MR. NOBLE asked who would be interested in serving on the environmental indicators report subcommittee. He said he knew that MR. TOLLEFSON and MR. SORENSEN had already expressed interest and had been doing some work. REP. TASH, MS. SOUVIGNEY and MR. MARX each indicated they would be interested in serving on the subcommittee. MR. NOBLE appointed MR. TOLLEFSON and MR. SORENSEN as co-chairs and REP. TASH, MS. SOUVIGNEY and MR. MARX as subcommittee members. REP. COCCHIARELLA moved to adopt the subcommittee named by MR. NOBLE. SEN. MESAROS seconded the motion. The motion passed unanimously.

MR. TOLLEFSON moved to direct the staff to proceed full force to get the grant application completed and in the mail. REP. COCCHIARELLA seconded the motion. The motion passed unanimously. MR. NOBLE said he thought the next step should be for the subcommittee to get together.

MR. MARX said he could offer a letter of support for the project from Governor Racicot if they thought that would be helpful in getting the grant.

#### **WATER POLICY OVERSIGHT--WATER DATA**

JIM STIMSON, Natural Resource Information Center (NRIS), provided handouts with an explanation of the Water Information System (WIS) and examples of the work WIS does. (EXHIBIT 1) He explained how the system developed as an outgrowth of NRIS. He said the WIS exists to make water information accessible to people who need it. He said the Internet had really expanded the WIS usage by everyone including groups such as ranchers, outfitters and school children, but WIS is also working to make things more accessible for people without computer access. He

said one of the most helpful aspects of the Internet is that WIS can pull information about Montana compiled or produced by other states. He said they have climate summaries for about 10 cities in Montana from a researcher in Colorado. The USGS is providing "real time" stream flow information, measurements taken every 15 minutes and uploaded via satellite. This used to be difficult to access. It's improved their contact with old sources. Besides this information clearinghouse function of the WIS, they operate the drought monitoring program. In October, 1995 MSU closed down their drought monitoring station. They used to provide the Palmer Drought Severity Index number. There are two other states that have drought monitoring systems similar to Montana. Montana is the only one producing maps with the index values. WIS has proposed to the National Climate Data Center that NRIS be officially named the climate information center for Montana. WIS is also working to expand access to climate information. They have a new source of information through a leading climatologist in Nevada. The same source can also provide the Standardized Precipitation Index which is better for monitoring soil and other precipitation conditions than the Palmer, to indicate whether areas are coming into a drought, are in a drought or coming out of a drought. MR. STIMSON said that the drought monitoring program started as a water development grant. When the money ran out, it was assumed WIS would absorb the cost of running the program. They have done that so far, but adding the climate center duties is going to be a strain on the budget, so they are working with the DNRC to find grant sources. They would like to hire a climate information specialist. MR. STIMSON said another issue is that there are many groups trying to balance use within their basins. Watershed groups are becoming a popular way to deal with finding ways to balance use. WIS is working with these groups to provide maps as "snapshots" of basins to help people see the whole picture. They've been contacted by several basin groups to do this and it's costly. Another of WIS's roles is with the Montana Rivers Information Center. They collect river



info, primarily on fisheries. NRIS has always provided a programmer for that program. MR. STIMSON said another one of his responsibilities is as chair of the Groundwater Assessment Steering Committee. The committee was created by the Groundwater Assessment Act and includes four members, one each from DNRC, DEQ, NRIS, and the Department of Agriculture as well as a large group of ex-officio members. One of the issues they have been working on is in the Kalispell/Flathead area. An issue arose regarding whether the state was trying to exert its sovereignty onto the reservation. It has now been resolved, and a cooperative agreement drawn up. It is significant because the reservation lands are sizable and a convincing groundwater study requires access to those lands. SEN. MESAROS asked MR. STIMSON when the WIS will be able to use the new index he spoke of to provide drought data in map form. MR. STIMSON said in about two months.

REP. TASH asked if the index would include soil moisture conditions. MR. STIMSON said no. He said that some of the soil data could be obtained from other sources.

REP. TASH said he felt the data should be coordinated in order to predict such things as floods. MR. STIMSON said that he agreed. They are working toward it, but it is complicated.

MR. NOBLE asked MR. STIMSON if they were using a 30-year average to compute drought data. MR. STIMSON said he thought all federal entities were using a 30-year average.

MR. NOBLE said the National Weather Service was now using a 10-year average.

MR. NOBLE said last interim they went to the State Library and for a demonstration of the WIS. He said if the Council desired, they would do it again.

SEN. GROSFIELD asked if NRIS charged for their services. MR. STIMSON said yes, they do. Their policy is that if a patron comes into the office or accesses them via the Internet and sees a map they want, it's supplied for free.

SEN. GROSFIELD asked if there was a method for verifying the accuracy of the data they download from other states from the Internet. MR. STIMSON said there is in place a program called METIDATA that serves that purpose. Participants in METIDATA must explain how they generated their data.

MS. SOUVIGNEY asked what impact the increase in Internet use has on staff workload. She said it sounds like usage of the WIS is way up, but that people are accessing the system through the net and bypassing the staff. MR. STIMSON said even though there were 2,500 requests, they were "painless" because the information was pulled right off the net by the users.

MR. SORENSEN said he thought it might be timely to visit the State Library after they decide on the indicators they will want to include in the environmental indicators report.

MR. NOBLE said he felt MR. STIMSON's program would be of great value to the indicators report. He also said the Council might be interested in a report on the new weather station in Great Falls.

#### **WATER QUALITY INFORMATION BOOKLET**

MR. NOBLE said that he had a discussion with MR. EVERTS concerning the number of requests for information received by LEPO staff about the quality of Montana's water. He said that MR. EVERTS suggested the staff produce a booklet for a non-technical audience explaining Montana's water laws and the state of Montana's water. He said he thought it would be a good way to fulfill information requests that will most likely be generated from the current Water Initiative. (See page 41 of these minutes.)

MR. EVERTS said he had spoken with staff at the DEQ regarding the need for such a publication. He said the DEQ had not considered it. MR. EVERTS said the EQC had, in the past, produced such publications. They have included a handbook on the Major Facility Siting Act, on the Right-to-Know statutes, the Final Status of legislation after each session, and the index to

environmental permits. MR. EVERTS said MR. KAKUK was handling the potential project.

MR. KAKUK said the staff was envisioning a 10- to 15-page primer on Montana's water quality statutes; a general overview. He said it would take him about a week to rough it out, then he would run it past the DEQ, private consultants and educators, and, finally, he would have staff at the Water Resources Center at MSU provide editorial services. MR. KAKUK said he would need approval from the Council to proceed with the project.

REP. COCCHIARELLA said she felt providing environmental information to the public was one of the EQC's most important duties. She moved to direct the staff to proceed with development of an information piece on Montana's water quality statutes. SEN. MESAROS seconded the motion. The motion passed unanimously.

LORNA KARN, Montana Farm Bureau, said she felt it would be a good idea to facilitate a better understanding of water law among the general public.

MR. JUNTENAN stated that impacts to water by active (mining) operating permits in Montana represent less than 2/10 of 1 percent of the impaired water in the state. He said the figure was similar for abandoned mines, as well. He said he felt the whole enforcement and compliance study was missing the point by evaluating programs, when there haven't been any guidelines or goals established regarding what "performance" really is. He said it is more important to ask if lakes and streams are benefitting from current compliance and enforcement programs.

MR. NOBLE said he thought that was a good suggestion and that it might fit well in the context of the indicators project.

A VISITOR FROM BUTTE said such a publication would be helpful for her because she deals with the media and she's concerned there is a lack of understanding of Montana water laws.

MR. NOBLE asked staff to submit the final product to the Council for approval.

SEN. GROSFIELD said he assumed the booklet would focus on water quality as opposed to water quantity and adjudication. He asked for specifics about the booklet i.e., will it have information on permitting and number of permits in the state, how our state fits in with federal standards, how we compare with other states?

MR. KAKUK said the booklet was still "conceptual" and he had not thought of including number of permits or actual numerical data, but that he did envision including discussion of the federal role. He agrees the connection between quantity and quality must be discussed.

SEN. GROSFIELD said he thought it might be important to include some information about who has discharge permits--subdivisions, mines, towns..., etc.

The chair adjourned for lunch. The EQC reconvened at 1:30. The Council continued its discussion of the proposed water quality booklet.

MR. TOLLEFSON said he understood that the purpose of the booklet was to serve as a simplified explanation of existing water laws.

SEN. MESAROS said he agreed the booklet should be simple and concise and non-technical.

#### **PONY MILL CLEANUP UPDATE**

(EXHIBIT 2)

MR. MITCHELL said he had invited JOHN ARRIGO from the Water Quality Division of the DEQ to the meeting, as well as FESS FOSTER from the Golden Sunlight Mine, and DAVID ZIMMERMAN, a Pony resident. MR. MITCHELL referred to SB 415 which was passed in the 1995 session and which provides some level of immunity from the CECRA requirements for strict joint and several liability, for those who voluntarily assist in the resolution of the specific site cleanup by contributing money or services. MR. MITCHELL explained that the milling firm in Pony went bankrupt and the lienholding issue would have to be resolved before clean-up could proceed. If the state did some work on the site that was determined to be detrimental to the value of the remaining

assets, the state or mining company that was doing the voluntary clean-up could become responsible parties. MR. MITCHELL asked MR. ARRIGO to discuss the DEQ's involvement with the Pony Mill site.

MR. ARRIGO said he would give a brief introduction and then show a short video of the site. He said they had been working with the site since the late '80s. The mill had a groundwater discharge permit to operate a mill and dispose of tailings in the mine impoundment. They did some milling for a period and then abandoned the site. Their permit was eventually revoked. Currently there exists at the site a large impoundment with wastewater and tailings in it. There's a leak detection system in the impoundment that has tested at 70 parts per million (ppm) cyanide. Normal, MR. ARRIGO said, is in the 300-500 ppm range. Some groundwater monitoring in the wells around the impoundment and in domestic wells and springs, has revealed up to .007 ppm cyanide in those samples. MR. ARRIGO said he wanted to stress that these levels they are finding in the groundwater are 28 times less than the maximum contaminant level allowed in public water supplies. The Department of Health and Environmental Sciences (now the DEQ) hired a contractor, with funds from the Water Quality Rehabilitation account, to pump out the leak detection system and construct diversion ditches and to monitor the situation. The impoundment contains about 15 million gallons of wastewater, mostly rainwater that has been contaminated. Some samples from the surface have up to .02 ppm cyanide. They estimate there are about 25,000 cubic yards (1.6 acres and 10 feet deep) of tailings beneath the water in the bottom of the impoundment and they have sampled some of that and it has 20 ppm cyanide. MR. ARRIGO said Governor Racicot responded to a request for help from MR. ZIMMERMAN. He told him that the State would help but first they had to find out what needed to be done and how it would be paid for. He directed the DEQ to come up with a plan. (At this point in the presentation, MR. ARRIGO showed and narrated a video of the site, the building, the impoundment, and

debris and waste left at the site, where they were taking samples. He said they know the impoundment is leaking because there's water in the leak detection system. The mill building is full of junk, mostly abandoned vehicles. There is spilled cyanide that could possibly be causing the groundwater contamination. The milling company filed for bankruptcy and the Montana Dept. of Justice has assigned an attorney. A trustee has been assigned to oversee the assets. There may be an auction. The state must not proceed with any corrective action without permission from the bankruptcy court or the trustee because there is concern about lowering the value of any assets at the site. Funding sources have not been identified. They have identified several remediation actions needed immediately-- removal of hazardous chemicals and securing the site to protect people, consolidating junk, disposal of impoundment water, neutralization of tailings, decontamination of the mill building, regrading the impoundment and monitoring site conditions. They have developed a schedule for the work. The people in Pony have different points of view about what they would like to see done. Some want it restored to as close to how the land looked before the mill was built. Others, he said, thought the site was more valuable as a mill and might be more valuable sold that way. MR. ARRIGO said from his point of view it was a fine facility, but that it was not maintained. A new operator would have to get a new permit and would have to address all the existing problems. The final draft of the clean-up plan was scheduled to be completed March 1. The DEQ planned to respond to comments by April 15, get funding, and get the bid package out in May. Meanwhile they are working to get a legal determination on what they are authorized to do at the site and then do the majority of the work this summer and fall. MR. ARRIGO said he felt the wastewater itself was benign, with about 1 ppm cyanide. He said they hope they can use that wastewater for irrigation on the slopes around the impoundment. Any residual cyanide would be broken down by sunlight. Then there will be the impoundment to deal with. The

options ranging from least expensive to most expensive are to (1) leave it as is and pump it out once a month, (2) repair the liner, neutralize tailings and maintain the site as a mill facility, or (3) get rid of the impoundment water, neutralize the tailings, encapsulate it all with the liner, seal up the tailings in the liner, bury it and revegetate or (4) remove part of the impoundment to create drainage. The costs range from \$10,000 to \$250,000. There is the Water Quality Rehabilitation Account that is funded by the Water Quality Act penalty money. That fund was legislatively terminated, but they used \$25,000 and there is \$35,000 left. Other funding sources might be State Superfund, the Environmental Contingency Account, DEQ funds, and in-kind services from interested parties.

SEN. DOHERTY asked MR. ARRIGO what kind of bond had been required for the facility. MR. ARRIGO said there was no bond. The site was issued a groundwater pollution control system permit. The State had no bonding authority in this case. They could, though, accept a voluntary bond. MR. ARRIGO said the Chicago Mining Company had said they would give a bond, but never did.

MR. DOHERTY asked if there was any requirement for a reclamation bond for the mill site itself. MR. ARRIGO said no, that the Department of State Lands (DSL) had promulgated regulations to require permits for mill facilities. There was a question as to whether the Pony mill was subject to those DSL requirements, they went to court and the District Court in Virginia City ruled against the state. No bond was required for reclamation or for water protection.

MR. SORENSEN asked if the mill site were to have started operating now, would a bond be required? Would the bond be adequate to cover what they are faced with now? MR. ARRIGO said he didn't know. He said if the mill were opened as a non-cyanide method mill, they wouldn't need an operating permit, but if they use cyanide, they would. That's where the bonding would come in. The bond would be calculated based on what it would cost to reclaim the facility. The original plan was to fill the

impoundment with tailings and then crown it and reclaim it, so there wouldn't be the need for the more expensive reclamation methods.

SEN. GROSFIELD asked how often they were testing. MR. ARRIGO said they started out sampling monthly. They pulled one sample of .7 ppm cyanide, but they think now that was a result of using contaminated sampling bottles. .007 ppm is the highest level they have seen of the about 20 samples taken monthly last winter and spring. Now they sample about bimonthly and results have been less than detection (.005).

SEN. MESAROS asked how big the impoundment is. MR. ARRIGO said about 15 million gallons, about 60 feet deep, the water about 18 feet deep and then about 10 ft. of tailings.

REP. TASH asked if the DEQ was currently monitoring wells around the impoundment. MR. ARRIGO said although there were wells around the impoundment, the pumps are 220 volt and there was no power at the site, so they would have to take a special generator or bring in a different pump.

SEN. GROSFIELD asked if there were any plans to treat the water before they pump it out and irrigate with it. MR. ARRIGO said no, that they feel the concentrations are low enough the sunlight will degrade the cyanide or it will be attenuated in the soil.

SEN. GROSFIELD asked if the DEQ had tested the little creek that flows through the Pony area. MR. ARRIGO said it had been tested and had not shown any evidence of cyanide.

MR. NOBLE asked if there were any mines in the Pony area. MR. ARRIGO said yes, there was the Boss Tweed Mine that was the headwaters of Pony Creek.

SEN. MESAROS asked if they had measured the levels of cyanide coming out of the mine. MR. ARRIGO said about five to seven years ago they measured it because the mill people were interested in taking waste rock out of the mine, processing it in an onsite plant and then discharging the tailings back into the mine. They were supposed to neutralize the tailings, but they



did not. The DEQ did sampling then and got them to neutralize the tailings to the point where the mine was no longer a source of contamination.

MR. MITCHELL said there were several representatives from the mining industry at the meeting who might want to discuss the Pony mill situation as it might relate to SB 415.

FESS FOSTER, Director of Geology and Environmental Affairs for the Golden Sunlight Mine, expressed his company's interest in helping in the Pony cleanup efforts. He said their legal staff was taking a look at SB 415 and the "early read" on it was that it should allow them to take part in efforts such as the Pony cleanup without inheriting liability, but the assessment is ongoing. He said they have also been waiting to see how the bankruptcy issue is resolved and whether the cleanup plan will go forth and what sorts of programs the cleanup plan will entail. They were planning to supply people to work as soon as the plan is in place. Possibilities might include financial and in-kind contributions and equipment use.

SEN. GROSFIELD asked if Golden Sunlight Mine had looked at the alternatives the DEQ is considering to figure out if the costs are reasonable. MR. FOSTER said he hadn't seen the figures before the meeting today, but he could ask Golden Sunlight engineering staff to review the cost estimates.

SEN. GROSFIELD said he brought it up because the issue had been raised earlier in the meeting that estimates coming from some of the state agencies might be on the high side to protect against liability.

MR. MITCHELL said there had been a very productive public meeting in Pony regarding the mill. He said two of the people from Pony were at the EQC meeting and he invited them to comment.

DAVID ZIMMERMAN, Pony resident, said the citizens of Pony never thought it was a good site for a facility of that type. He said it was now an attractive nuisance and a public hazard. He said it needed immediate action to get it cleaned up and closed down

before a serious accident occurred. He said he was well aware of the possibility of diminishing the value of the site with reclamation efforts, but that it should not preclude resolving the issue. He feels most of the equipment in the area is junk. The only value, in his opinion, is in the building. He thinks the leaky impoundment would take quite a bit of repair to use again. MR. ZIMMERMAN said the detection system where the leakage is accumulating has been tested at 70 ppm. That's being pumped about every two months, at a cost of about \$4,000 every time, plus the cost of testing. He feels the first two options the state has proposed that would maintain the status quo of pumping out the system every two months is a false solution. He feel the other alternatives might be more attractive to the citizens of Pony. However, they find options 5 or 6 the best because they represent the most complete resolution of the problem.

SEN. DOHERTY asked who was paying for the bimonthly pumping out of the leak detection system. MR. ARRIGO said the DEQ contracted with an outside firm, Olympus, to do the work. He said they are trying right now to decide whether to continue the pumping.

SEN. DOHERTY asked MR. ARRIGO to clarify where the water was that had been tested at 70 ppm cyanide. MR. ARRIGO said the impoundment was double-lined and under that is a geonet and under that is another liner. Anything that leaks past the first double liner and trickles down through the geonet and into the second liner goes into a trap in the bottom of the impoundment. On the dam side of the impoundment there is a "horizontal well" that goes between the two liners and fits into the bottom of that trap. They pump that out and measure the ppm cyanide. He said the fact that there is liquid in there shows that rainwater is percolating throughout the tailings, picking up some cyanide and leaking back into the liner. He said what they don't know is if there's a leak in the bottommost liner, but they think there must be because they're finding traces of cyanide in a spring below. SEN. DOHERTY asked if the water that had 20 times less cyanide than standard drinking water is just the standing water on top of

the first liner. MR. ARRIGO said no, that it was in MR. ZIMMERMAN's well and in the spring below.

SEN. DOHERTY asked if it was the 25,000 gallons filling up every couple of months that has 70 ppm cyanide. MR. ARRIGO said yes, and that was probably what was leaking into the environment.

SEN. GROSFIELD asked how much the DEQ had spent on the Pony situation. MR. ARRIGO said about \$25,000 plus additional staff time, with a value of about \$5,000 or \$10,000.

SEN. GROSFIELD asked if a child was hurt very badly or died playing at the site, if the state would be liable? MR. ARRIGO said that was something they didn't know, but they want to minimize the chances of that happening.

MR. MITCHELL said that at the Pony public meeting, the Attorney General's office explained the current situation is that the owner of the property is the trustee who was appointed by the bankruptcy court in Chicago. As far as questions of liability are concerned, the bankruptcy court or the trustee who would be the owner of record.

MR. ZIMMERMAN said the people from the DNRC Dam Safety came and looked at the impoundment and said, although the dam was generally sound, there have been some failures in it, a serious 100-feet long crack and another crack, as well.

FLORENCE ORE, Pony resident, said she had several comments. The first was regarding the water in the leak detection system. She said she wanted to add that the level of cyanide had become higher than when it was first tested. They don't know why.

Second, she said, she feels the report from Olympus Environmental, demonstrates what happens when there is no regulation. The Water Quality Division did issue a permit. She said she would hate to think what the water would be like in the impoundment if the DEQ had no permitting authority at all. She feels the company is criminally negligent. She said cows had died up there. Around the cyanide mix building the ppm cyanide testing has revealed 780 ppm. MS. ORE said she feels if there had been bonding required for this mill, she doesn't think the

mill would ever have been built, because they would not have been able to get a bond. She said she hoped the Compliance and Enforcement Subcommittee would consider how they could keep something like this from happening to another community. She thanked all the state employees and the EQC for considering the issue.

JIM JENSEN, Montana Environmental Information Center, commented on the question of the state's liability in the matter. He said he had provided in the last month a copy of a decision from the District Court in Hamilton relating directly to the liability of a state agency failing to act in good faith or comply with their own regulations. The judge ruled that the state is liable for harm to and diminished value of the property of people whose water has been polluted by a landfill built near their land. The decision was based on the state being deficient in its regulating actions.

SEN. DOHERTY said he thought a "post mortem" examination of Pony was in order because of the money and staff time spent on the issue. He said he would like to know if there was anything that could have been done differently to prevent the problem. Also, he wondered if there is anything that needs to be done to make sure it doesn't happen again i.e., are there "holes in the law?" or was someone not doing a thorough job?

MR. NOBLE asked MR. ARRIGO if the DEQ had discussed this question. MR. ARRIGO said he didn't know, but that he had been involved with the site since before it was permitted and he said from looking at the laws involved, it appeared they didn't all "mesh together." The problem, though, according to MR. ARRIGO, is that "Chicago Mining left town," not that there was gross oversight or malfeasance on the parts of any state agencies. MR. ARRIGO referred to some of the citizens' remarks that the mill should never have been built at that site, but, he said, when the DEQ issued the original permits, the company answered all the questions and provided all the reassurances asked for, so the mill was approved. That was where it broke down. Also, he said,

the regulations and the laws that were in effect at that time have changed twice, so it's hard to track.

SEN. DOHERTY asked, hypothetically, if the same milling company were to propose the same mill at the same site today, could it all happen again? MR. ARRIGO said the biggest difference now would be that they would have to be bonded under the Metal Mining Reclamation Act because they would be using cyanide. Failures could occur, but the state would have more options in addressing the failures. He reiterated that the double-lined impoundment was expensive and effective, and the whole facility was good, but because it wasn't maintained, it failed.

SEN. DOHERTY asked if the reclamation bond that would have been required if the mill were built now would be sufficient to cover the cost of the reclamation. MR. ARRIGO said yes. He said the DSL reclamation people are now part of DEQ and they have been involved in developing the bonding figures. He said the figures they were using to estimate how much Pony reclamation would cost were based on those figures. He said they knew they were on the high side, but they wanted to overestimate rather than underestimate to be on the safe side, but that they would make every effort to economize when they actually made the expenditures. They already were working with people from the mining industry who had been to the site and had helped with the irrigation plan, keeping cost effectiveness in mind as well as all other factors.

MR. NOBLE asked if the DEQ had any idea when the bankruptcy would be settled. MR. ARRIGO said the Justice Department attorney who was working on the issue said he would send the draft plan to the court to use it as justification that the environmental issues need to be addressed.

SEN. DOHERTY said there were changes in the mining bonding laws last session. With the changes, he said he recalled, the DEQ was required to demonstrate that it would be very likely that there would be a problem and only then could they ask for a bond. Since it appeared that no one saw it as likely that they were

dealing with an "outlaw" that was going to "take off," how would the changes affect the bonding situation? MR. ARRIGO said he did not know. He said TERRY WEBSTER had suggested that the state should have authority to consider the economic viability of these operations, raising questions such as, "Why build a mill when there is no ore nearby?"

MR. NOBLE asked where the ore that was being milled at Pony was coming from. MR. ARRIGO said the area is scattered with old mining claims, as well as waste rock piles. Before opening the mill, the Chicago Mining Company was taking ore out of a mine in the area called the A & P mine.

SEN. GROSFIELD said that the reason the legislature gave the DEQ bonding authority in cyanide processing operations was so that situations like Pony would not happen again. He said, obviously, in any cyanide processing operation, there would ultimately be a need for reclamation, so bonding would have to be adequate in any case.

MR. NOBLE asked MR. FOSTER how leaks in impoundment liners were found and how they might be repaired. MR. FOSTER said time and money spent trying to pinpoint the leak probably wouldn't be cost effective. He speculated that draining the entire leak detection system, and then possibly neutralizing the system might be a better option than trying to find and seal the leak.

SEN. GROSFIELD asked what the capacity was of water between the two liners. TERRY WEBSTER, DEQ, said they have pumped out 25,000 gallons twice, so far.

#### **UPDATE ON THE STATUS OF THE WATER QUALITY INITIATIVE**

MR. KAKUK said staff felt a little uncomfortable talking about the Clean Water and Protection and Public Health Protection Act of 1996 because this EQC meeting marked the first time the initiative had been discussed by an official body of the state. MR. KAKUK distributed copies of the initiative (EXHIBIT 3), explaining it was not in final petition form, but that the language of the initiative was probably final. He said the

Attorney General's office had the responsibility with this initiative, as with all initiatives, to write a short (100-word), objective statement of purpose. They are still refining that statement. MR. KAKUK said what the act proposes to do is to apply new treatment requirements to certain discharges in certain situations. It applies to all new metal mines and to major amendments to metal mines that use cyanide, and to all new metal mine exploration licenses. It applies if a level of a carcinogen, toxin or nutrient in the discharge exceeds the water quality standards. If these situations exist, it requires effective removal. Effective removal means the removal of each carcinogen, toxin or iron and manganese down to the water quality standards or the removal of more than 80 percent of each carcinogen, toxin or nutrient, whichever is more protective of water quality. MR. KAKUK explained a hypothetical situation wherein contaminant X is a carcinogen and there is a mine discharge at 20. There exists a standard of 10. Under existing law the mine could request a discharge permit and the DEQ would be able to issue them a discharge permit without any treatment but using a mixing zone to get the water to the standard. MR. KAKUK said his understanding of the mixing zone rules was that contaminant X would not require treatment. This is not the same as non-degradation. Before a mine could get a non-degradation authorization they would have to be providing the best treatment available. If the initiative passed, and this was a brand new mine, the DEQ could not grant them a mixing zone. That's probably the biggest thing the initiative does; it eliminates mixing zones in one of those types of mines mentioned in the initiative. So, at the point of discharge contaminant X must be below the standard. The hypothetical mine wants to discharge at 20, so the standard applies. So, what does the mine have to do? The initiative says they have to get below the standard or remove 80 percent of the carcinogen, whichever is more protective of water quality. The hypothetical standard is 10. 80 percent of 20 means it must be less than 4. Therefore, the DEQ says you

have to go down to 4. But if contaminant X is a nutrient and the mine wants to discharge at 20 and the water quality standard is at 10, the initiative says less than 10 or, at 80 percent, less than 4. But, if the mine discharge were at 40, and the water quality standard is still at 10, the initiative says you have to take it down to 10 or, at 80 percent, down to 8. If the mine discharge is at 80, the initiative says less than 10 or, at 80 percent, less than 16. 16 is greater than the water quality standard. In 2A of the initiative, it says "the removal of each carcinogen and toxin and iron and manganese to the level required by the water quality standards." Nutrient isn't included in 2A, so you don't have to get down to the standard. If the discharge is so much that even removing 80 percent won't get down to the standard, then the mine doesn't discharge down to the standard, it discharges down to the 80 percent, creating a de facto mixing zone.

MR. NOBLE asked MR. KAKUK for examples of nutrients and carcinogens and what MR. KAKUK meant by "de facto" mixing zone. MR. KAKUK said de facto is "in fact." A mixing zone will occur because the water discharged is not going to be at the water quality standard and there are laws that say it has to be after mixing, so there will be a mixing zone. A common carcinogen, he said, would be arsenic and nitrates would be a common nutrient. MR. NOBLE asked if the initiative affected anyone outside the mining industry. MR. KAKUK said it did not. He said he had talked with proponents, opponents and the DEQ, and, he said, he was concerned with some other issues regarding the initiative. One, he said, was applicability. The language in the statute says that this is applicable to ensure effective removal of each carcinogen, toxin, nutrient, iron and manganese occurring in the discharge. MR. KAKUK said he was questioning whether a mining company starting a mining operation would tell the DEQ they would be discharging above the standard, so they will be required to remove 80 percent. MR. KAKUK thinks that won't happen. He thinks the mining company would figure that if they can get the



discharge low enough in contaminants before discharge, they won't be subject to the law because they won't be violating the standard. MR. KAKUK expressed this concern to TOM FRANCE, a proponent of the initiative, who said no, the DEQ will consider what the state of the water was prior to any treatment by the company. Regardless of what method the mining company wanted to use to get the units somewhere below 10 so this act would not be applicable, they would be basing their determination on what level of treatment was required. JOHN NORTH, DEQ Chief Legal Council, said that's correct and MR. KAKUK said he asked him where in the act he found the DEQ would have the authority to use the level of contaminants prior to discharge in any sort of determination. The initiative says "effective removal means prior to any dilution or discharge," not prior to any treatment. MR. NORTH said the statutory construction requires that he give force and effect to every provision in the bill and if the initiative passes in its current form, he has to interpret it to mean discharge is not the water actually leaving the facility but water that could be discharged prior to any treatment by the industry. So, with that interpretation, MR. KAKUK said, the industry would tell you their interpretation would be that it would always be 80 percent because that would always be more protective, except in the situation where there is such a high level of discharge of nutrients, there is a "de facto mixing zone."

REP. SHEA asked MR. KAKUK to clarify section 2 of the initiative regarding severability. MR. KAKUK explained that the severability section is a standard section in bill drafting. It says that if part of the initiative is invalid, the rest of the bill still stands.

REP. SHEA asked if section 1 was specifically targeting McDonald Gold Project. MR. KAKUK said he didn't think it was specifically targeting any specific operation, other than the operations they named. He said he had heard arguments either way about whether it would affect the McDonald Project. He said it would depend on

where McDonald is in the set-up process if and when the initiative is approved. MR. KAKUK said he questions the part of the section that states, "may not issue an operating permit for a new cyanide leach or other precious metal or base metal mine and may not issue a major amendment to a permit for a cyanide leach mine." This section means (except for a mine that doesn't utilize cyanide) that if a mining company wanted to make a major amendment to a mine they could pursue the amendment but would have to worry about the initiative. MR. KAKUK said he asked the writers of the initiative why they didn't include all mines in the major amendment part, and they said that was the "Butte MRI exception."

REP. SHEA asked if by adding an amendment to the bill, that part could be thrown out. MR. KAKUK said it could be, but the only way to amend it would be during the next legislative session. He said even if section 2B, for example, was found to be superfluous by the court, that the rest of what the initiative says still has force and effect, forcing dischargers to treat down to standards.

SEN. DOHERTY asked if MR. KAKUK recalled the Legislature ever amending an initiative passed by the citizens of Montana.

MR. KAKUK said no, not in the three sessions he had worked.

SEN. GROSFIELD referred to the phrase in the initiative, "Effective removal means that prior to any dilution or discharge to state waters..." and speculated that the part that says "prior to discharge into state waters" is the part that refers to mixing zones. MR. KAKUK said he disagreed with that interpretation because as he understands it, being phrased the way it is, it eliminates mixing zones.

SEN. GROSFIELD said yes that was true, but where it got rid of mixing zones was where it said "prior to discharge to state waters," not where it says "prior to any dilution." He said he believes the word "dilution" doesn't refer to mixing, it refers to any kind of dilution under any circumstances. MR. KAKUK said the argument could be made that this would have gotten rid of

mixing zones without the "dilution" language, so therefore the "dilution" language must have some other additional meaning. One hypothetical meaning might be that the mining companies could not pump groundwater, store it, mix it down, and then discharge it in order to meet the standards.

SEN. GROSFIELD said, using MR. KAKUK's example of contaminant X, if 80 percent removal would get the contaminant level down to 4, but economically they can only get it down to 6, they might consider mixing a gallon of 0 water with a gallon of 6 and it would get the level down to 3, but, he said, it didn't appear to him that the initiative would allow that. MR. KAKUK said that was his understanding, too.

SEN. GROSFIELD asked if the initiative was just about mining process water or would it cover septic tanks, etc. on a mine permitted area. MR. KAKUK said he did not know.

#### **MAJOR FACILITY ACT SITING ACT COLLABORATIVE UPDATE**

ART COMPTON, DEQ, explained that the DEQ was in the second year of a two-year regulatory reform effort aimed at making the Montana Major Facility Siting Act more responsive to regulatory needs and the needs of the electric utility industry. The electric utility industry has been undergoing a substantial rebirth over the last few years. Rather than project sponsors proposing to build large thermal generating plants the utilities are going to private independent power producers to competitively obtain relatively small generating facilities. The siting act, he said, was poorly equipped to deal with the new electrical environment. The DEQ also found a continuing need to address the siting and construction of linear facilities such as electric transmission lines and pipelines. There are always a number of those types of projects proposed by the federal agencies, instate utilities and electric coops across the state. Linear facilities are often considered undesirable from a local point of view. The working group has worked to develop public dialogues to support the siting of those types of linear facilities. This reform

effort has had some big roadblocks in the last few months. There are very few issues on which there is any consensus. There is a group of participants who do not think there should even be a siting act. There are others who think there should be a siting act, but should not direct generation resources, just linear resources. Another group is very reticent to give up any part of the traditional siting act which dates back to the 70s. As a means of breaking up the log jam, DEQ proposed two months ago to step back from generation resources which were the crux of the group's inability to achieve consensus on issues and look at linear facilities to try to find consensus issues. MR. COMPTON said that had been fairly successful. There is a subcommittee looking at attributes of a linear siting act rather than a major facility siting act. MR. COMPTON explained that a linear facility would be an electric transmission line or pipeline that carries electrons or crude oil. Linear facilities cross a lot of land and many individual jurisdictions, conservation districts and counties etc. Those types tend to be regionally needed, but often landowners don't want them on their land. The working group hasn't divorced themselves from discussion of generational facilities. They will have to come back to it, although it will be problematic. The objective of the working group will be to present in the 1997 legislative session, legislation that provides badly needed changes to the siting act.

REP. COCCHIARELLA asked for examples of the new generational facilities MR. COMPTON had mentioned.

MR. COMPTON said it could be anything from a 50 megawatt plant attached to the Exxon refinery in Billings to a project burning waste coal in other than an industrial area, commonly called a "green fields" project. The siting act was conceived in the early 70s when many Montanans were concerned that the banks of the Yellowstone River might become a boiler room. Following the siting of Colstrip's 1,2,3 and 4 the concern was that eastern Montana coal was going to dominate the Pacific Northwest energy picture and Montana needed some legislation in place that would

allow the public to deal with those types of developments. That scenario has evaporated, and because of the new environment the electrical utilities are operating in, the type of facilities they are likely to see are those small ones from 50 to 150 megawatts, not owned by the utilities, rather their output is purchased by the utilities and they are owned by private independent power producers. Timing is of the essence. It's difficult for a private entity to bid a power rfp issued by a utility when looking at just a 2-year permitting time frame. It calls for more timeliness on the part of regulatory agencies.

MR. NOBLE asked if a gravel pit would be considered a generating facility. MR. COMPTON said it would not. A generation facility is one that produces electrons for ultimate public use.

REP. COCCHIARELLA asked about timeliness and if that is the reason parties can't get together, because of timeliness and a competitive bid situation. MR. COMPTON said it was both timeliness and the question of the propriety of a public entity review of what is considered by many to be a market-oriented decision. These power contracts that utilities are putting out for bid each year and the responses to those bids in the form of individual energy proposals are very much market driven and because they are small, industry believes those types of decisions should be market-based rather than under regulating agencies.

MR. SORENSEN asked, regarding pipelines, what would now come under the major facility siting act? MR. COMPTON said it starts at 17 inches in diameter. There are many pipelines in Montana smaller than that and it was decided not to subject those to review. There were many people who thought the smaller pipelines should be regulated. There are many residential land use permits that have developed up and down the Clark Fork corridor and the people who live in that corridor are concerned. There was legislation last session to lower the siting to 9 inches, but it was not introduced.

MR. SORENSEN said he didn't understand why MR. COMPTON was saying the linear facility situation had changed other than there are more people living in rural Montana. He asked what were the objectives they had regarding linear facility regulation. MR. COMPTON said the state just wants to preserve the status quo. Also, rather than the review times in the siting act now, that there be faster processing for relatively short linear facilities that might be processed under a 6-month EA type proposal.

MR. JENSEN, Executive Director of the Montana Environmental Information Center, commented regarding his organization's views on the upsurge of the smaller facilities. He said the proliferation would not be to the benefit of residential and small business consumers because a major rate payer is reduced from having to share the burden. So, residential and small business consumer rates go up. They won't be big enough to take advantage of the smaller facilities. MR. JENSEN said there was potential for an unusual marriage between environmentalists and regulated utilities because the environmentalists also see this arrangement of independent power producers as being short term because it's based on finite resources. It significantly reduces the development of alternative energy resources which are less polluting or renewable. He said he wanted to remind the Council that the collaborative deals only with the siting act and is not dealing with bigger policy questions. MR. JENSEN said he felt this area would be a good candidate for the environmental indicators report.

REP. COCCHIARELLA asked MR. PICHETTE, representing the Montana Power Company and among the public attending the meeting, if Montana Power Company buys power from the small generation facilities. MR. PICHETTE said they have to under federal law. Encouragement was given under federal law for the production of non-utility generation by independent operators. It was perceived that the only way the non-utility generators could survive would be if the utilities were forced to buy power. In the U.S., generally, it's becoming more economic to build the

plants and compete for customers without having to have the force of the "PURPA law," as it's called, to force utilities to buy it. MPC has a subsidiary that builds and sells power from these kinds of projects in other parts of the country. He said he agreed with just about everything MR. JENSEN said. They have a proposal before the PSC to provide a way to keep working on developing renewable energy. One of the concerns is if conservation or renewable energy is more expensive to produce than you can get from the small natural gas turbine, people will quit producing renewable energy.

MR. TASH asked MR. PICHETTE how wheeling charge figures in it. MR. PICHETTE said the federal regulatory commission will set a transmission charge which MPC will be allowed to assess. He added that MPC would be happy to send someone from the company to discuss this issue at a future EQC meeting.

MR. NOBLE asked whether it was true that there was concern that Columbia Falls Aluminum was not paying enough for their electricity. MR. PICHETTE said the Federal Regulatory Commission was in the process of requiring that anyone owning transmission facilities must make them available between third parties on a wholesale basis. For example, if Idaho Power wants to sell power to Curtis Electric, a Montana company, MPC can charge for using their lines, but Idaho Power is allowed to sell to them. The concern wasn't so much that they were selling to that coop, but rather, whether it was, a real arrangement or if Curtis Electric was actually a retail customer.

MR. EVERTS noted the EQC had historically been involved in energy issues. He said he had been attending some of the PSC meetings. The energy industry is at a crossroads because there is deregulation of an industry that has been heavily regulated for a long time. MR. EVERTS said staff would be happy to set up a discussion of energy issues.

REP. COCCHIARELLA said she felt the Council still needed an update on Yellowstone Pipeline issues. She noted that MR.

COMPTON had commented that they were trying to get public involved in the pipeline issue and asked him to explain.

MR. COMPTON said there were linear facility projects ongoing that don't fall under siting act review but the project sponsors believe there is some value in having public members in the dialogue. Since the reorganization and the accompanying consolidation of permitting authority, smaller projects were starting to come before his division for MEPA review. If the sponsors pursue a pipeline route circumnavigating the reservation, the DEQ will be involved through their MEPA responsibilities. They have already been working with national forests. Yellowstone is building a road in Helena linking the highway to the railway in order to get the product off the road and onto the rails. This might not be a long term solution, though, because it's too expensive, but Yellowstone is still pursuing a route off the reservation. The issue very polarized.

REP. COCCHIARELLA said she was involved with the issue. She said she spent time at the terminal in Missoula where they were loading tanker trucks to go along the Flathead and Clark Fork River, what she feels is some of most beautiful water in Montana. She said she had fears about that. She feels everyone involved in the project should be aware of the options and the best ways to facilitate the project. She thinks the EQC should have oversight, because of the importance of the issue. She said she still believes the pipeline is the safest way to move the product, but she feels it's a huge problem.

MR. COMPTON said he agreed, and he assured her that once a formal proposal is made to site the pipeline around the reservation, it will be a major, two-year, joint state and federal EIS effort.

SEN. GROSFIELD asked if the tribe was willing to settle on the issue for the right amount of money. MR. COMPTON said he didn't believe there was any negotiation going on right now between the Yellowstone Pipeline Company and the tribes. The tribes have rejected all offers. Apparently the tribes didn't feel money was the issue, rather the behavior of the pipeline company.



**MEPA CASE LAW UPDATE: RAVALLI COUNTY FISH AND GAME ASSOCIATION V. MONTANA DEPARTMENT OF STATE LANDS**

MR. EVERTS explained the case. He said it attempts to clarify when MEPA review is required and what form that environmental review will take. A person who leased state land in the Sula State Forest for purposes of raising cattle transferred his permit to a person who changed the use from grazing cattle to grazing sheep. This became an issue because there is a population of wild bighorn sheep in the area. DSL issued an EA in July 1992 and revised it in September of 1992. The Ravalli County Fish and Game Association brought suit in District Court. The District Court entered a summary judgement that the law was clear, and denied the suit brought by the Fish and Game Association. However, the fact that the Supreme Court saw as critical was that DSL did not determine the significance of the impact it was evaluating. In the DSL rules, they were required to make that determination.

MR. EVERTS said the real issue is what triggers MEPA--does a change in a grazing lease on state land change an action under MEPA? The Montana Supreme Court said if a license or renewal maintains the status quo, that it is ministerial action and is exempt from MEPA review. However, if there is a change in use that could have potentially significant impacts, that is an action subject to MEPA review and requires an Environmental Impact Statement. MR. EVERTS said there are trust land implications because of the way the Court justified the DSL's inaction becoming, in essence, an action was that the state agency had responsibilities to the wildlife populations.

SEN. DOHERTY asked if an individual can sublet his grazing permit to another person without notifying the state. SEN. GROSFIELD said he was not a state land lessee, but as he understood it the original lessee may not sublet for profit without notifying the state.

MR. EVERTS said JOHN NORTH said it was just a paper transfer with no mechanism for the DSL to examine the issue.

SEN. MESAROS said he understood there are periodic reviews within the DNRC and further action only takes place when a problem comes up when there is a change in use.

REP. TASH added that the state land lease included a contractual agreement with the state to practice good land management techniques and protect the land from weeds and wildfire.

MR. NOBLE asked for public comment.

MR. NOBLE said he would like to have meetings in Butte, in Lincoln or both before the end of the year.

SEN. MESAROS said he thought meetings outside Helena are valuable because they demonstrate to people outside of Helena that the Council is interested in points of view outside of the capital.

The chairman adjourned the meeting at 4:00.